Tunku Norella Suriani bt Tunku Yusoff & Ors v Kumpulan Sierramas (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S6–22–979 OF 2006
ROSILAH YOP JC
18 APRIL 2011

Tort — Nuisance — Private nuisance — Exclusive housing estate — Frequent open burning of prayer items by resident — Ash and smoke blown to neighbouring houses — Construction of prayer altar in obtrusive position — Whether neighbours' quiet enjoyment of land interfered with — Breach of deed of mutual covenants signed by residents — Whether development and construction guidelines of housing estate breached — Developer's failure to act on residents' complaints

The plaintiffs and the second defendant were house owners and/or residents of the Sierramas West housing estate which was developed by the first defendant. All the house purchasers, including the plaintiffs and the second defendant, had signed deeds of mutual covenants ('DMC') with the first defendant as condition precedent to their purchase of houses in the estate. By their execution of the DMC the purchasers acknowledged the first defendant's intention to develop Sierramas West into a well-planned, regulated and exclusive housing estate harmonious with the natural landscape and environment. Annexed as a schedule to the DMC were property development and construction guidelines ('guidelines') intended to ensure that any building constructed was respectful to the neighbours and the surrounding open spaces. The DMC provided that the first defendant had the right to take whatever action it deemed fit to enforce the terms thereof including power to enter onto any property to rectify defaults. The plaintiffs complained to the first defendant about the second defendant's breaches of the DMC and guidelines in several material respects but it was alleged the first defendant failed to act on the complaints. The plaintiffs claimed that the second defendant had committed private nuisance by interfering with their quiet enjoyment of their land by (i) regular and frequent open burning of prayer offerings that caused ash and smoke to be blown into neighbouring houses; (ii) creating loud, sharp sounds akin to letting off fire-crackers; (iii) allowing his premises to be used other than for single family residential purpose; (iv) allowing vehicles of visitors to be parked in such a way that it obstructed free flow of traffic and (v) constructing a prayer altar in an obtrusive location.

Held, allowing the plaintiffs' claim against both defendants:

(1) The second defendant had breached cl 3.1(e) of the DMC by openly

burning prayer offerings twice a month that caused an annoyance or nuisance to the neighbours. He had also breached clause 7.5 (k) of the guidelines by having an altar in an obtrusive position (see paras 78, 19, 20 & 51).

(2) The first defendant had contravened the DMC and guidelines by failing to enforce the terms of both on the second defendant. The discretion to enforce the DMC and guidelines in a just, fair and equitable manner lay entirely with the first defendant but its investigations on the plaintiffs' complaints were poor, incomprehensive and unjust (see paras 79–80).

(3) The first defendant's investigation of the plaintiffs' complaints was partial as only the second defendant was interviewed. The complainants, most of whom were the plaintiffs, were not interviewed. The first defendant did not even tender its report of the investigation and this withholding of evidence raised an adverse inference against it under s 114(g)of the Evidence Act 1950 (see paras 61–62).

(4) The first defendant was also negligent when it decided, wrongly and without due enquiry, that the second defendant did not breach the DMC. In so doing, the first defendant failed to exercise its discretion in a fair, honest and reasonable manner in the interests of all residents at Sierramas West (see paras 69, 67 & 64).

[Bahasa Malaysia summary

Plaintif-plaintif dan defendan kedua merupakan pemilik rumah dan/atau pemastautin estet perumahan Sierramas West yang dimajukan oleh defendan pertama. Kesemua pembeli rumah, termasuk, plaintif-plaintif dan defendan kedua, telah menandatangani surat ikatan perjanjian bersama ('surat ikatan perjanjian tersebut') dengan defendan pertama sebagai pra-syarat pembelian rumah-rumah di estet. Dengan meterainya surat ikatan perjanjian tersebut, pembeli-pembeli mengakui niat defendan pertama untuk memajukan Sierramas West menjadi terancang, terkawal selia dan estet perumahan eksklusif yang harmoni dengan lanskap dan persekitaran semulajadi. Dilampirkan sebagai jadual kepada surat ikatan perjanjian tersebut adalah pemajuan hartanah dan garis panduan pembangunan ('garis panduan') yang bermaksud untuk memastikan mana-mana bangunan yang dibina akan menghormati jiran-jiran dan ruang persekitaran yang terbuka. Surat ikatan perjanjian tersebut memperuntukkan bahawa defendan pertama mempunyai hak untuk mengambil apa jua tindakan yang dirasakan sesuai untuk menguatkuasakan terma-terma termasuk kuasa untuk memasuki mana-mana hartanah bagi membetulkan kerosakan. Plaintif-plaintif mengadu kepada defendan pertama mengenai pelanggaran surat ikatan perjanjian dan beberapa bahagian material garis panduan oleh defendan kedua tetapi adalah didakwa bahawa defendan pertama gagal mengambil tindakan bagi aduan-aduan tersebut. Plaintif-plaintif menuntut bahawa defendan kedua telah melakukan

kacau ganggu persendirian dengan mengganggu kenikmatan aman sentosa tanah mereka dengan (i) kekerapan pembakaran terbuka upacara sembahyang yang menyebabkan abu dan asap ditiup masuk ke dalam rumah kejiranan; (ii) membuat bunyi yang kuat dan bingit seakan-akan untuk melepaskan mercun (iii) membenarkan premisnya digunakan bukan bagi tujuan pemastautinan satu keluarga; (iv) membenarkan kenderaan-kenderaan pelawat ditempatkan dalam keadaan di mana ia mengganggu kelancaran trafik dan (v) meletakkan tempat sembahyang di lokasi mengganggu.

Diputuskan, membenarkan tuntutan plaintif terhadap kedua-dua defendan:

(1) Defendan kedua telah melanggari klausa 3.1(e) surat ikatan perjanjian dengan membakar secara terbuka upcara sembahyang dua kali sebulan yang menyebabkan kacau ganggu kepada jiran-jiran. Dia juga telah melanggar klausa 7.5(k) garis panduan dengan meletakkan tempat sembahyang di posisi mengganggu (lihat perenggan 78, 19, 20 & 51).

(2) Defendan kedua telah bercanggah dengan surat ikatan perjanjian dan garis panduan dengan gagal untuk menguatkuasa terma-terma kedua-duanya ke atas defendan kedua. Budi bicara untuk menguatkuasa surat ikatan perjanjian dan garis panduan dengan adil dan berekuiti terletak sepenuhnya pada defendan pertama tetapi siasatan ke atas aduan plaintif-plaintif tidak memuaskan hati, tidak menyeluruh dan tidak adil (lihat perenggan 79–80).

(3) Siasatan ke atas aduan defendan pertama hanyalah sebahagian kerana hanya defendan kedua yang disoal siasat. Pengadu-pengadu, yang kebanyakkannya adalah plaintif-plaintif tidak disoal siasat. Defendan pertama tidak mengemukakan pun laporan siasatan dan keengganan memberikan bukti ini membangkitkan inferens bertentangan terhadapnya di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 61–62).

(4) Defendan pertama juga cuai apabila ia memutuskan, secara salah dan tanpa mempersoalkan, bahawa defendan kedua tidak melanggari surat ikatan perjanjian. Dengan berbuat sedemikian, defendan pertama gagal untuk menjalankan budi bicaranya dengan adil, jujur dan munasabah bagi kepentingan semua pemastautin Sierramas West (lihat perenggan 64, 67 & 69).]

Notes

For cases on public nuisance, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1574–1575.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Arab Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors [2003] 1 ML J 567, CA (refd)
Breen v Amalgamated Engineering Union & Ors [1971] 1 All ER 1148; 2 QB 175, CA (refd)
Canada Steamship Lines Ltd v The King [1952] AC 192 (refd)
Hunter v Canary Wharf Ltd [1997] 2 All ER 426, HL (refd)
Koh Siak Poh v Perkayuan OKS Sdn Bhd [1986] 1 MLJ 238; [1985] CLJ (Rep) 506; [1985] 1 CLJ 174 (refd)
Premier Hotel Sdn Bhd v Tang Ling Seng [1995] 4 MLJ 229; [1995] 1 LNS 166, HC (refd)
Sivalingam v Periasamy [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
SQ Wong Holdings (Pte) Ltd, Re [1987] 2 MLJ 298 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (refd)

Legislation referred to

Contracts Act 1950 s 29
Evidence Act 1950 s 114(g)
National Land Code s 5

S Sekhar (Joel Lim with him) (Sekhar & Suaran) for the plaintiff.
Abdullah Omar (Hisham Sobri & Kadir) for the first defendant.
Gunaseelan (Gunaseelan & Associates) for the second defendant.

Rosilah Yop JC:

BRIEF FACTS

[1] The plaintiffs are at all material times, house owners and/or residents at Jalan Keruing Kipas, Sierramas West, Sungai Buloh, Selangor.

[2] The first defendant is the developer of the said Sierramas West residential estate. The second defendant is the house owner at Lot 136, Jalan Keruing Kipas, Sierramas West.

[3] The plaintiffs' homes are in close proximity to the second defendant whereby first and second plaintiffs are his immediate neighbours at Lots 135 and 137 respectively. They have entered into deeds of mutual covenants, P1 ('DMC') with the first defendant by reason of the fact that it was condition to the sale and purchase of their houses in Sierramas West.

[4] The DMC provides for, amongst others the purchaser acknowledges the intention of the first defendant of developing Sierramas West into a well-planned, regulated and exclusive residential estate with recreational

facilities/amenities embracing a new community style living in harmony with the existing natural landscape and environment.

[5] The Sierramas West Property Development and Construction Guidelines ('Construction/Property Development Guidelines') which are annexed to the DMC as the Second Schedule are intended to, among others, ensure that any buildings constructed pay due respect to both their neighbours and the surrounding open spaces in the interest of a harmonious community.

[6] DMC was drafted by the first defendant. The first defendant acts as the custodian and enforcer of the terms therein. The plaintiffs complained about the second defendant breaches to the first defendant but the first defendant refused to act on the complaints.

ISSUES TO BE TRIED

[7] The issues to be tried in respect of the claim are as follows:

(a) Between the plaintiffs and the first defendant —

(i) whether the first defendant has the responsibility or duty of care in tort against the plaintiffs to ensure that the terms of DMC and / or the guidelines are complied with by all house owner in Sierramas West;

(ii) whether the first defendant have full discretion in enforcing the terms of the DMC and / or the guidelines on all house owner in Sierramas West.

(b) The agreed issues to be tried between the plaintiffs and the second defendant —

(i) 'Sama ada defendan kedua telah melakukan perkara-perkara yang diplidkan oleh plaintif di dalam perenggan-perenggan 12, 12.1, 12.2, 12.3, 12.4,12.5, 16.2, 16.3, 16.4, 16.5, 16.6, 16.7, 16.8, 16.9,16.10, 16.11,16.12,16.13, 16.14 dan 16.15 pernyataan tuntutan bertarikh 27 September 2006.

(ii) Sekiranya jawapan kepada isu No 1 ialah 'ya' sama ada defendan kedua telah melanggar terma-terma Suratikatan Waad-Waad Bersama dan Garis Panduan Pembangunan dan Pembinaan Hartanah Sierramas West dan sama ada terma-terma Suratikatan Waad-Waad Bersama dan Garis Panduan Pembangunan dan Pembinaan Hartanah Sierramas West boleh dikuatkuasakan terhadap defendan kedua.

(iii) Sekiranya jawapan kepada No 1 ialah 'ya', sama ada defendan kedua telah melakukan tort perbuatan-perbuatan kacau ganggu

persendirian dan mengganggu kenikmatan secara aman hak-hak berkaitan hartanah plaintif-plaintif.

(iv) Sekiranya jawapan kepada isu No 1 ialah 'ya' sama ada kelakuan defendan kedua adalah tidak konsisten dengan pembangunan Sierramas West sebagai gaya hidup kediaman komuniti secara harmoni.

(v) Sama ada plaintif-plaintif adalah berhak kepada relief-relief yang dipohon terhadap defendan kedua, di dalam pernyataan tuntutannya.

ALLEGED CONTRAVENTION OF THE DMC AND/OR GUIDELINE BY THE FIRST DEFENDANT

[8] The first defendant had failed, refused and/or neglected to take any or any appropriate action in respect of the various complaints against the second defendant.

ALLEGED ACTS OR CONDUCT IN CONTRAVENTION OF THE DMC AND/OR GUIDELINE BY THE SECOND DEFENDANT

(a) had conducted noxious activities on his property, including but not limited to, undertaking regular and frequent open burning of offering;

(b) had let and/or permitted noise or sound of cracking of the whip, of which is similar to that of letting off fire crackers;

(c) appeared to have allowed his premised to be used for purpose other than for single family residential purpose;

(d) allowed number of vehicles to be parked at or around the common facility area in such a manner as to impede or obstruct the free movement of vehicles of some of the house owners and/or residents, including the plaintiffs herein; and/or

(e) had constructed a prayer altar in an obtrusive location.

EVIDENCE AND FINDINGS

[9] The plaintiffs gave evidence through PW1, PW2, PW3 and PW4. The defendants on the other hand gave evidence through DW1, DW2, DW3 and DW4.

[10] The evidence for the plaintiffs on the material issues as adduced by its witnesses was clear and generally not challenged in cross-examination. I will scrutinise the evidence against the second defendant first.

Whether the second defendant had conducted noxious activities on his property, including but not limited to, undertaking regular and frequent open burning of offering

[11] PW1 testified that the second defendant practiced open burning at his house which caused unpleasant and noxious smells of smoke which also caused ashes to be blown to neighbouring houses. On certain occasions the burning was from a drum which was placed out in the open area under his porch whereby paper were thrown in, resulting in smoke and ashes blown to neighbouring lots. This evidence of PW1 was corroborated by the evidence of PW2, PW3 and PW4. PW2 testified that ashes landed in her kitchen, her porch and even on her cars. The plaintiffs' witness were cross-examined about dates, times and particulars of this burning when all the while these particulars were within the full knowledge of the second defendant, which are on the first and 15 of every Chinese calendar month in a year.

[12] Further, the second defendant admitted during cross-examination that he burns paper in a bin twice a month, on the first and 15 of every Chinese calendar month for offering. This fact is a matter within the specific knowledge of the second defendant.

[13] I find as a fact that the second defendant had admitted burning papers on the first and 15 of every Chinese calendar month. Therefore the facts that he practiced open burning of offering were proven.

[14] The second defendant agreed in cross-examination that smokes and ashes did escape from the burning bin and fall about 2 to 3 meters away from the bin. He also admitted that after the burning he covered the bin and went back into his house. He did not go to any of the plaintiffs' lots to see if ashes have been blown to their lawn.

[15] Therefore the eye witness testimony of the plaintiffs' witness is more credible as she had personally witnessed the said ashes in her compound. It was never put to the plaintiffs' witness that they may have seen wrongly or ashes from other sources or that they are not telling the truth. On a balance of probabilities, it is the plaintiffs' testimonies that are more probable.

[16] The plaintiffs' witnesses were not examined on the above material evidence and as such I would have to accept their evidence as truthful evidence. The Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794; [1995] 3 CLJ 639 at p 658 had this to say:

> ... It is essential that a party's case be expressly put to his opponent's material witness when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case … It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases.

[17] The Court of Appeal case of *Sivalingam v Periasamy* [1995] 3 MLJ 395; [1996] 4 CLJ 545; where the court held that 'It is essential that a party's case be expressly put to his opponent's material witness when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party in the absence of valid reasons refrain from doing so, then he may be barred from raising it in argument It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well'.

[18] Clause 3.1(e) of DMC reads as follows:

> No noxious, offensive or illegal activities shall be carried on upon the said property, nor shall anything be done thereon which is or may become an annoyance or nuisance to the other purchasers.

[19] It is clear from the evidence adduced that the second defendant had failed to comply with cl 3.1(e) of DMC and thus, committed breach of contract by the second defendant.

[20] Whether the second defendant practiced of open burning at his house which caused unpleasant and noxious smells of smoke which escaped and caused ashes to be blown to neighbouring houses is a private nuisance?

[21] The tort of private nuisance was considered in the case *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, where Lord Lloyd of Berwick, after stating at pp 441 c–d that private nuisances are of the following three kinds, namely:

> (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land,

said at p 442:

> ... It has been said that an actionable nuisance is incapable of exact definition. But the essence of private nuisance is easy enough to identify, and it is the same in all three classes of private nuisance, namely interference with land or the enjoyment of land. In the case of nuisances within class (1) or (2) the measure of damages is, as I have said, the diminution in the value of the land. Exactly the same should be true of nuisances within class (3). There is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no

A diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts. If that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor.

B **[22]** The Court of Appeal in the case of *Arab Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors* [2003] 1 ML J 567 had accepted the illustration of 'smoke from a neighbouring factory' to amount to such a nuisance.

C **[23]** PW1, PW2, PW3 and PW4 testified that there were smokes and ashes with unpleasant and noxious smells escaped and caused ashes to be blown to the plaintiffs' houses especially PW1 and PW2 house. These had caused interference with a neighbours' quiet enjoyment of their land.

D **[24]** The open burning as conducted by the second defendant falls within nuisance by interference with a neighbour's quiet enjoyment of his land. As such the second defendant has breached cl 3.1(e) of DMC and also committed the tort of private nuisance.

E **[25]** Applying the law to the facts of this case, I conclude that the emission of smoke and/or noxious substances via the second defendant open burning falls within the said illustration and amounts to a private nuisance. It cannot be denied that this interference with the plaintiffs' quiet enjoyment of their land and inevitably reduces the amenity value of their land.

F *The second defendant had let and/or permitted noise or sound of cracking of the whip, of which is similar to that of letting off fire crackers*

G **[26]** The plaintiffs had pleaded at para 12.2 in the statement of claim as follows:

12.2 had let and/or permitted noise or sound of cracking of the whip, of which is similar to that of letting off firecrackers;

H **[27]** The plaintiffs' witness testified that they had all heard loud sound akin to fire crackers. According to the cl 3.2 states as follows:

[28] Clause 3.2

I The Purchaser shall not permit any noise or sound from the letting off of fire crackers, talking, singing …

[29] Clause 3.2 of the DMC is very specific. The clause only prohibits noise or sound from the letting off of fire crackers. There is no provision against noises 'akin to firecrackers'. No evidence was led by the plaintiffs to show that the second defendant had been letting off firecrackers. Thus, this item of claim remains unproven.

The second defendant appeared to have allowed his premised to be used for purpose other than for single family residential purpose

[30] There was no direct and credible evidence from the plaintiffs' witnesses to establish that the second defendant had used his premise for purposes other than for single family residential purpose. The plaintiffs rely on cl 3.1(a) of DMC which provides that 'the said property shall be used for single family residential purposes only …'

[31] Apart from the fact that the plaintiffs failed to prove this allegation, the second defendant in his evidence said that occasionally his parents will come and stayed with him. This does not mean that the second defendant has contravened cl 3.1(a) of DMC because the first defendant had explained that, that cl 3.1(a) was meant specifically for permanent residence.

[32] Further, the most pertinent issue that has to be considered is that the statement of claim pleads that 'the second defendant appeared to have allowed his premised to be used for purpose other than for single family residential purpose'. The claim cannot be based on a mere conjecture. On those reasons above, this complaint has to be dismissed.

The second defendant allowed number of vehicles to be parked at or around the common facility area in such a manner as to impede or obstruct the free movement of vehicles of some of the house owners and/or residents, including the plaintiffs herein

[33] All the plaintiffs' witnesses testified that they encountered obstruction of free flow of vehicle by visitors parked at the second defendant house. In cross examination PW1 testified that she did not witness the incident.

[34] PW2 and PW4 in cross-examination admitted that there are security personnel who would ask for cars to be removed if they are parked indiscriminately.

[35] All the plaintiffs' witness could not gave the particulars or the vehicle number that was alleged to be parked at the common facility area.

[36] Based on the above evidence, the plaintiffs has failed to prove on the balance of probabilities that the second defendant had allowed vehicle to be parked indiscriminately and thereby obstruction or impending the free flow of traffic, the second defendant did not breach cl 3.1(a) of DMC.

Had constructed prayer altar in an obtrusive location

[37] Clause 7.5(k) of the Sierramas West Property Development & Construction Guidelines attached in Second Schedule of DMC states that: 'prayer altars are to be set back a discreet distance from the property line and placed in an unobtrusive locations.'

[38] DW3, Chan Yow Choy, who is the senior project manager of the first defendant testified that the second defendant has a further five meters of garden available from the altar to his house. DW1 and DW3 testified that the second defendant had space at the back of his house on a lower ground level.

[39] The altar was placed in front of the second defendant house. P3A, P3B, P3C and P34 proved this. It is undisputed facts that the altar was situated a mere 1.12 meters away from the front of the second defendant property line and only 2.235 meters from the first plaintiff house.

[40] The second defendant himself, during cross-examination had admitted that the altar was in a place where everyone can see.

The second defendant submitted that there are two elements to this complaint. The first being, the altar must be constructed and secondly the altar must be in an obstructive location. The plaintiffs must prove both elements.

Further, it was submitted that s 5 of the National Land Code applies in this situation. Clause 7.5(k) states that:

> Prayer altars are to be set back a discreet distance from the property line and placed in an unconstructive location.

[41] There is no distinction made between prayer altars that are constructed or installed.

[42] DW2, who is the legal and administration of the first defendant, admitted that pre-fabricated prayer altar did not breach the DMC, were fresh terms unilaterally imposed by the first defendant. This clause was in because the first defendant had encountered numerous problems with same altar issues in Sierramas East, whose DMC did not contain the same clause. The first

defendant did not specify what type of altar would infringe cl 7.5(k) when drafting the DMC. So it must apply to all altars, given the plain and ordinary meaning of the words.

[43] Further, cl 7.5(a) to (j) deals with rubbish bin, cloths lives, air-conditioner units, extend water filters, sola water heater, ground lathing fixtures and garden sheds. All these are not constructed but installed. There is no distinction between constructed and installed to be made for prayer altar. Section 5 of the National Land Code has no application in this action.

[44] It is trite law that documents must be construed within its four corners. This is the decision of the Federal Court in *Tindok Besar Estate Sdn Bhd v TinjarCo* [1979] 2 MLJ 229; [1979] 1 LNS 119 and the Supreme Court case of *Koh Siak Poh v Perkayuan OKS Sdn Bhd* [1986] 1 MLJ 238; [1985] CLJ (Rep) 506; [1985] 1 CLJ 174, where it was held that in a clear and unambiguous document the court should not go beyond any written terms.

[45] The question here is whether it is in a discreet distance from the property line and whether it is an obtrusive location to place the altar as where it is now.

[46] The *Oxford Reference Dictionary* defines the word 'discreet' as follows: '... 1. showing caution and good judgment in what one does; not giving away secrets. 2. unobtrusive.'

[47] 'Unobtrusive' is defined in *Oxford Reference Dictionary* as follows: '... not making oneself or itself noticed.'

[48] During the cross-examination, the second defendant admitted that the altar was in a place where anyone can see.

[49] In the circumstances, I agree with the submission for the plaintiffs that the altar, being a mere 1.12 meters away from the property line and 2 meters away from the first plaintiff house is in a discreet distance from the property line and in an obtrusive position constituting a breach of cl 7.5(k) of the Construction/Property Development Guidelines.

[50] Clause 12.1 of the DMC clearly states that compliance with the Sierramas West Property Development & Construction in Schedule 2 is mandatory. Clause 12.1 states as follows:

> The Purchaser acknowledges and confirm that he has read, fully understood and will comply with the Construction / Property Development Guidelines which is annexed as the Second Schedule.

[51] The second defendant had entered a binding contract with the plaintiffs, therefore he is contractually bound by the terms of DMC. It is obligatory for him to adhere to the DMC. It is clear from the evidence adduced that the second defendant had failed to comply with cl 7.5(k) of the Sierramas West Property Development & Construction Guidelines.

The first defendant had failed, refused and/or neglect to take any or any appropriate action in respect of the various complaints against the second defendant

[52] It was admitted in the defence of the first defendant that each plaintiff had separately entered into a common deed of mutual covenants (DMC) with the first defendant.

[53] Further, it was the evidence of the first defendant that the intention of the Sierramas West Property Development and Construction Guidelines among others is to ensure that any buildings constructed pay due respect to both their neighbours and the surrounding open spaces, in the interest of harmonious community. It could not however override the legitimate and reasonable construction and/or installation of structures for the purpose of religious worship within the compound of the purchasers.

[54] The DMC was imposed on all purchasers inclusive of all plaintiffs. It was imposed because it was a condition precedent to any sale and purchase agreement entered into by them.

[55] It was admitted by DW1 in cross-examination that it was a condition precedent that the plaintiffs signed the DMC before purchasing their houses. The first defendant is the enforcer of DMC.

[56] Pursuant to cl 22.5 DMC, the first defendant has the right to enforce the DMC. Clause 22.5 DMC reads as follows:

> The vendor may take whatever action it considers appropriate to seek relief in respect of any breach by the purchaser of this Deed including but not limited to:
>
> (a) injunctive relief;
>
> (b) declaratory relief;
>
> (c) recovery damages
>
> and shall be entitled to seek such relief concurrently.

[57] Furthermore, pursuant to cl 22.7 DMC, the first defendant was given power to enter onto any property to rectify the defaults.

[58] The evidence of DW1 was corroborated by DW2 that they are under a duty to make due inquiring when they received complaints.

[59] DW2, Mr Ramesh admitted that during their investigation, Mr Albert Lim and Mr Khusyairi only interviewed the second defendant. They failed to interview the complainants themselves. Most of the complaints are the plaintiffs in this suit. The first defendant based their decision not to enforce the terms of the DMC against the second defendant on the investigation report by Mr Albert Lim and Mr Khusyairi. This investigation was partial, as they only listened to the second defendant side of facts. The first defendant did not even produce the report as evidence in court.

[60] In not tendering the said report, the first defendant had withheld evidence and as such, adverse inference under s 114(g) of the Evidence Act 1950 ought to be raised against the first defendant. The inference here is that if the report was tendered, the evidence would favour the plaintiffs.

[61] The first defendant sought to unilaterally impose fresh terms into the DMC as stated in D9. These fresh terms suggested that if the altar is pre-fabricated, readymade, installed as opposed to constructed, placed within the confines of the property, than it may be placed anywhere on the property. DW2 admitted in cross-examination that these were fresh terms. Clause 7.5(k) of the construction/property guidelines makes absolutely no mention about such absurdities.

[62] When discretion is conferred on someone in a special position or authority, that discretion must be exercised fairly and honestly in the interest of all residents at Sierramas West.

[63] In *Breen v Amalgamated Engineering Union & Ors* [1971] WLR (CA), per Lord Denning MR stated:

> If the rules set up a domestic body and give it discretion, it is to be implied that the discretion must be exercised fairly. Even though its functions are not judicial or quasi judicial but only administrative, still it must act fairly and should it not do so the courts can review its decision.

[64] In *Re SQ Wong Holdings (Pte) Ltd* [1987] 2 MLJ 298, held that:

> In law, the directors have discretion whether or not to recommend a dividend, even on the preference shares, but this discretion must be exercised fairly and honestly in the interest of the company.

[65] The evidence shows that the first defendant did not exercise its discretion in a fair, honest and reasonable manner.

[66] The first defendant seeks to invoke cll 25.1 and 25.2 of DMC to exclude all liability against them. These clauses do not absolve the first defendant of liability for negligence and are inapplicable when considering negligence simply because they do not specifically exclude liability for negligence.

[67] The plaintiffs complaint against the first defendant were not only did the first defendant refused to enforce the DMC against the second defendant, but the first defendant also found wrongly and without due enquiry, that the second defendant did not breach the DMC. Clearly, the exercise of discretion is only with regards to enforcement and not discretion with regards to any finding of facts made by the first defendant, which was negligence on their part when they decided that the second defendant did not breach the DMC. It is clear that the first defendant did not exercise its discretion in a fair and reasonable manner.

[68] The first defendant also trying to invoke cl 26.2 of the DMC to nullify the plaintiffs' rights to a cause of action. Such a clause contravenes s 29 of the Contracts Act 1950 and thus it is illegal.

[69] It is trite law that any attempt to exclude liability for acts of negligence must be expressly and clearly worded.

[70] It is trite law that any attempt to exclude liability for acts negligence must be expressly and clearly worded. In the case of *Canada Steamship Lines Ltd v The King* [1952] AC 192 where it states at p 208 as follows:

> ... It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case.

This position was accepted in the case *Premier Hotel Sdn Bhd v Tang Ling Seng* [1995] 4 MLJ 229; [1995] 1 LNS 166 states that:

> General words of exclusion would not ordinarily protect a contracting party from liability for negligence. To protect him from liability for negligence, the words used must be sufficiently clear, usually either by referring expressly to negligence or by using some such expression as 'however caused'. Here, the exemption clause did not clearly or specifically exempt liability for negligence.

[71] It is clear that cl 25.1 DMC does not make any express and clear reference to acts of negligence. Clause 25.1 DMC cannot be read to exempt any liability from negligent acts.

[72] Furthermore, cl 25.2 DMC is only applicable to cl 25.1 DMC which states as follows:

> … shall be bound by *this clause* and shall be deemed to have automatically waived any and all rights, claims, demands and causes of action against the Vendor arising from or connected with any matter for which the liability of the Vendor has been disclaimed *this Clause*. (Emphasis added.)

[73] Clause 25.1 of DMC does not expressly exclude liability for negligence or for breach as a duty of care by the first defendant or for refusal to enforce the terms therein. Any attempt to exclude liability for acts of negligence must be expressly and clearly worded.

CONCLUSION

[74] It is not disputed that the plaintiffs and the defendants are bound by deeds of mutual covenants and Sierramas West Property Development and Construction Guidelines. From the evidence adduced I find that the second defendant has breached cl 3.1 (e) of DMC and cl 7.5 (k) of Sierramas West Property Development and Construction Guidelines. The discretion to enforce the DMC and Sierramas West Property Development and Construction Guidelines in just, fair and equitable manner lies entirely with the first defendant. In this case, this court is of the opinion that there were poor, incomprehensive and unjust investigations done on the complaints made by the plaintiffs'. The first defendant has contravened DMC and Sierramas West Property Development and Construction Guidelines because failing to enforce the terms of DMC and Sierramas West Property Development and Construction Guidelines on the second defendant. Thus, the court hereby allows the plaintiffs' claim as pleaded in the statement of claim against the first

A defendant in prayers 1(a), (b) and (c), 2(b) and (d) and prayer 3. The court also allows the plaintiffs' claim against the second defendant in prayers 4, 6, 7, 8, 9 and 10. Prayer 10 to be taxed.

Plaintiffs' claim against both defendants allowed.

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Reported by Ashok Kumar

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